APR 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-286

COPY

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

Appellants,

v.

PURSUE, LTD.

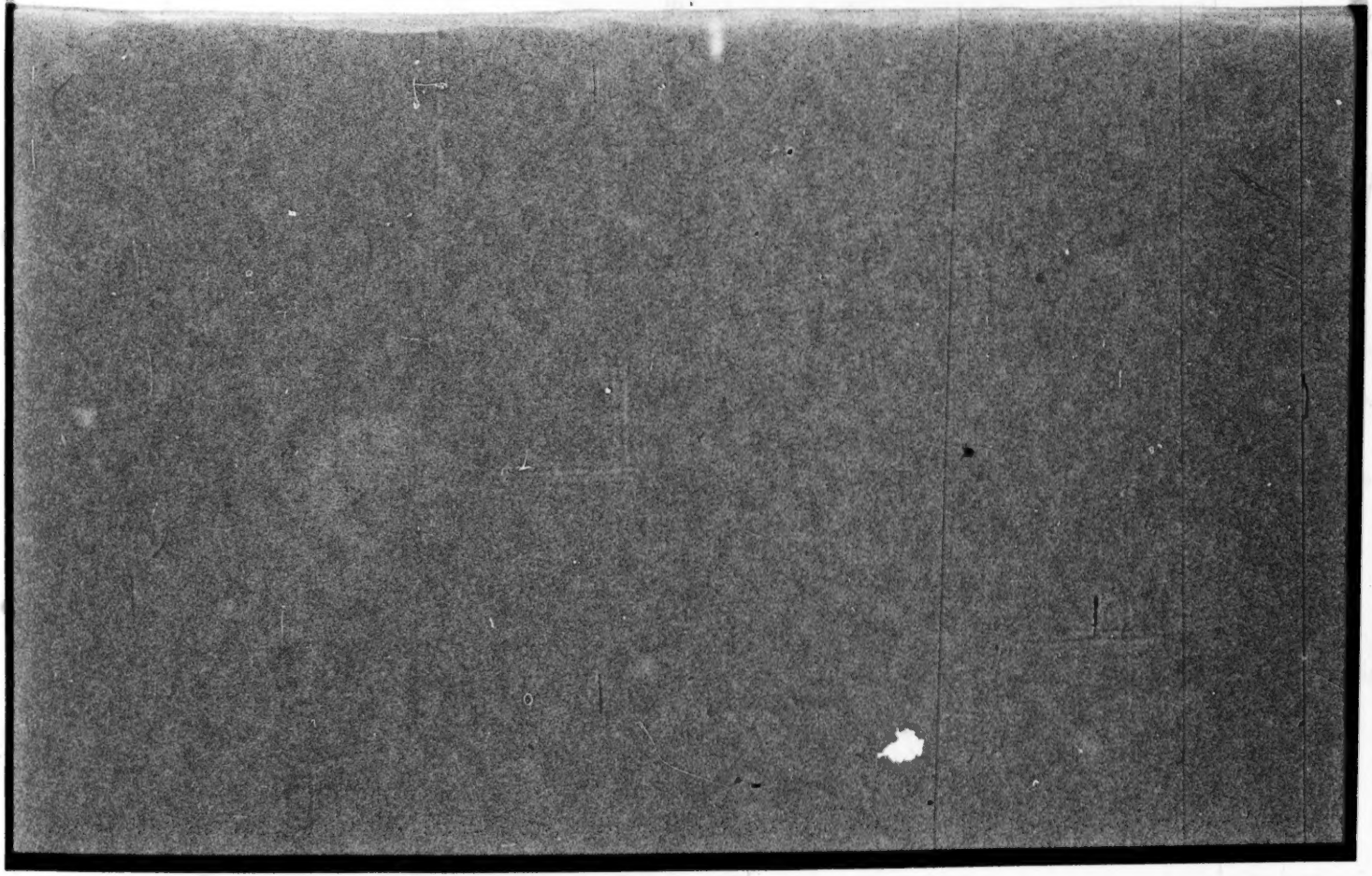
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

PETITION FOR REHEARING.

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Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

Appellants,

v.

PURSUE, LTD.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

PETITION FOR REHEARING.

Petitioners, Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio, and Edward Fair, as Sheriff of Allen County, Ohio, pray that a rehearing be granted of this Court's decision of March 18, 1975, vacating the judgment of the three-judge U.S. District Court and remanding the cause for further proceed-

ings consistent with this Court's opinion.

REASONS FOR GRANTING
A PETITION FOR REHEARING

I

The Court's opinion has failed to consider the threshold question of the jurisdiction of the federal district court to act on Dec. 1, 1972; i.e., whether or not the matter which was pending in the State Court was in the "exclusive" jurisdiction of the State Court, and whether or not, because of the "res" exception, the federal court on Dec. 1,1972 lacked jurisdiction of both the parties and property which were before the State Court. See "Questions Presented", 1 and 2 and Points I and II of Brief for Appellants, dated Nov. 8, 1974, at pages 3 and 4 and pages 31-39.

Appellants submit that the only question on this appeal is whether the federal district court had jurisdiction on December 1, 1972, when Pursue Ltd. filed the federal action. If the federal district court did not, then the federal restraint applied by Federal District Judge Walinski on that date, which prevented Appellants from executing the

final State Court judgment, was improper.

The hearing before the three-judge court on Mar. 12, 1973 was a hearing on the Motion to Dissolve the Dec. 1, 1972 temporary restraining order, filed by appellants on Feb. 12, 1973, some 2-1/2 after the temporary restraining order was issued. If the federal action filed on Dec. 1, 1972 was premature under the "res" exception (since the cause on Dec. 1,1972 was clearly "pending" in the trial court for purposes of post-trial motions such as motions for new trial, notice of appeal, etc.),is this Court prepared to say that Judge Walinski's Dec. 1, 1972 temporary restraining order (which would be invalid under the "res" exception since jurisdiction was lacking) suddenly acquired validity on Feb. 12, 1973, the date of filing of Appellants' Motion to Dissolve the Dec. 1, 1972 temporary restraining order, or became valid on Mar. 12, 1973, the date of the hearing of Appellants' Motion to Dissolve the Dec. 1, 1972 temporary restraining order, merely because, due to lapse of time and Appellee's failure to perfect an appeal, it became equally as obvious that the state trial

court and state appellate courts no longer had jurisdiction and, therefore, the cause was no longer "pending" in the state court system?

Appellants submit that the record herein shows that this appeal lies from a federal cause of action which was filed on Dec. 1, 1972 and a federal restraining order issued on the same date. The "threshold" question on this appeal is whether the federal court had jurisdiction on Dec. 1, 1972 when the federal action was filed. It was on that date that the federal court acted to restrain appellants from executing the state court judgment, and it was a motion to dissolve that order which was being considered by the three-judge Court on Mar. 12, 1973. Appellants are not pursuing an appeal from a restraint applied pursuant to a federal court action which appellees could have filed after the state court action was no longer pending. See page 5 infra. If as noted in footnote 19 of this Court's opinion, the plea of "res judicata" is not available to appellants on this appeal, because not

a part of the record,[1] is not the appellee also to be denied the defense of a hypothetical federal cause of action which might have been filed on a later date, but which the record below shows was not filed?

II.

The Court's opinion, in avoiding the "primary" jurisdiction issue, has assumed a set of facts which do not exist in the record and were not properly a part of the instant appeal. At Point V of the opinion (Slip Opinion p. 14-15) the Court incorrectly assumed as follows:

> "But appellee's point, we take it, is not that the state proceeding had not begun, but that it had ended by the time its District Court complaint was filed. . ."
> (Our emphasis.)

This straw man which the majority opinion has erected does not comport with the facts as above noted, that the federal action was filed on the day after entry

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1. Appellants submit that the plea of "res judicata" to the federal cause of action filed on Dec. 1, 1972 was not appropriate where the action was still "pending" in the state court for purposes of post-trial motions, notice of appeal etc.

of the final judgment when the case was clearly "pending" in the trial court for purposes of post-trial motions etc. Nor does it coincide with the claims of appellee in his brief. See Brief for Appellee at page 33:

> ". . .this case concerns both the absence of criminal prosecutions both pending or threatened and concern a state civil action which is no longer pending save for the execution of the injunction granted in the state court..." (Our emphasis.)

Appellee admits that at the time of filing the federal action, the civil action was "pending" in the State Court until final "execution of the injunction" granted in the state court. It was with this in mind that he approached the federal court for relief on Dec. 1, 1972. As already pointed out by this Court in other parts of the majority opinion, his approach should have been made to the state trial court for any one of the post-trial motions which would have "stayed execution", such as a motion for a new trial, or an offer to establish that the

public nuisance had been abated etc.[2/]

A. Statement Of Facts Appearing On The Record.

This appeal was perfected by Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio and Edward Fair, as Sheriff of Allen County, Ohio, following this Court's refusal to grant extraordinary relief in a Motion for leave to file a Petition for Writ of Mandate or Prohibition in Huffman et al. v. United States District Court for the Northern District

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2. In a recent case, State of Michigan, ex rel. William L. Cahalan, Wayne County Prosecuting Attorney v. Diversified Theatrical Corp., a Michigan Corporation, ____ N.W.2d ____ (Mar. 4, 1975) the Court of Appeals of Michigan (Div.1) affirmed the trial judge's application of the Michigan Red Light Abatement Statute and its one-year padlocking feature to several theaters which were exhibiting "Deep Throat", "Devil In Miss Jones", It Happened In Hollywood" and "Little Sisters". When the Court of Appeals opinion was filed, law enforcement immediately applied the "padlock" order. On a Motion for a Stay of Judgment, the Michigan Supreme Court ruled that the padlock penalty could not be applied until final process was issued by the Clerk of the Court of Appeals, which period was not less than 20 nor more than 30 days etc. (see copy of Order at Appendix A to this petition).

of Ohio, Western Division et al., No. 72-1613, 413 U.S. 918, 37 L.Ed.2d 1039, 93 S.Ct. 3068 (June 25, 1973). The motion was finally denied in Lawrence S. Huffman et al. v. United States District Court for the Northern District of Ohio et al., 414 U.S. 1021, 38 L.Ed.2d 325, 94 S.Ct. 463 (Nov. 12, 1973). In both the motion for extraordinary relief and this appeal, the "threshold" question was "Did the federal district court have jurisdiction on Dec. 1, 1972", and appellants' fundamental claim in that regard was that, under the "res" exception the federal court lacked jurisdiction where the subject matter was pending in the state court, and that therefore (1) the federal action did not lie when the case was filed on Dec. 1, 1972, and (2) the federal district judge on Dec. 1, 1972 did not have the authority to grant a temporary restraining order. The basic facts pertinent to appellants' claim that the federal district court on Dec. 1, 1972 lacked jurisdiction to issue the temporary restraining order are as follows:

1. On Nov. 30, 1972, at approximately 2:30P.M. the Allen County Common

Pleas Court granted a permanent injunction and thereafter journalized its order, a copy of which is reprinted in the Appendix at pages I 3-7 (Brief for Appellants at page 13)

2. On Dec. 1, 1972, appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled Pursue, Ltd. v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County Ohio, and Edward Fair, in his capacity as Sheriff of Allen County, Ohio, CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C.Section 1983, together with motions for a temporary restraining order, preliminary and final injunction and application for a 3-judge court. On Dec. 1, 1972, the same date that the federal action was filed, United States District Court Judge Nicholas J. Walinski entered an ex parte order in such action, "to prevent great and irreparable harm to the plaintiff, prior to the convening of a 3-judge court in this matter, pursuant to 28 U.S.C., Section 2248" which ordered the judgment of the Allen County Common Pleas Court in State ex rel Huffman v. William

H. Dakota et al., 72-CIV-0326, date Nov. 30, 1972, stayed except "insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing". (Brief for Appellants at page 14-15.)

3. On December 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, District Court Judges Nicholas J. Walinski, and Don J. Young as members of the three-judge District Court in Pursue, Ltd. v. Huffman et al., 72 Civ. 432. On December 21,1972, said three-judge District Court ordered all parties to file briefs in the matter on or before January 15, 1973. (Brief for Appellants at page 16.)

4. On February 12, 1973, appellants herein filed three motions with detailed supporting memoranda in Pursue, Ltd. v. Huffman, 72 Civ. 432, namely: 1. A Motion for Immediate Hearing; 2. A Motion to Dissolve the Temporary Restraining Order, and 3. A Motion to Dismiss. Copies of said motions and the supporting memoranda are reprinted in the Appendix at pages 03-016. (Brief for Appellants at page 19)

5. The three-judge Federal District

Court heard oral arguments on the temporary restraining order in Pursue, Ltd. v. Huffman, et al., 72 CIV 432, on March 12, 1973. A copy of the transcript of the March 12 proceedings (hereinafter referred to by the designation "T") has been lodged with the Clerk of this Court as Exhibit 1 to the Petition for a Writ of Mandate or Prohibition, in Huffman et al. v. United States District Court for The Northern District of Ohio, Western Division, No. 72-1613, on file with this Court. During such proceedings, the court defined the scope of the hearing as:

> "THE CLERK: The matter before the Court this morning is Pursue Ltd., et al versus Lawrence S. Huffman, et al., bearing Civil No. 72-432. Hearing on Temporary Restraining Order. Parties by counsel are present."(Brief for Appellants at page 21 and 22.)

Petitioners herein submit that the Statement of Facts on record, recited above, clearly establish that the "threshold" inquiry is and was "Did the federal district court have jurisdiction on Dec. 1, 1972 to issue the temporary restraining

order?" If the single judge federal district court did not have jurisdiction on Dec. 1, 1972 and the Dec. 1, 1972 order was invalid, the further action of the three-judge Court on Mar. 12, 1973 could not breath new life into such order, and it should be the duty of this Court to remand the cause and direct its dismissal by the lower court. 4 C.J.S. Appeal and Error § 41 Jurisdiction of Inferior Court at page 161.

III.

Appellants are presently entitled to an answer to the jurisdictional issue on this appeal, having properly raised the question of the federal district court to act on Dec. 1, 1972, both in this cause, and in its motion for extraordinary relief filed over two years ago.[3/]

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3. In the Motion for Leave to File a Petition for Writ of Mandamus or Prohibition (see page 7, supra.) Questions 2(a) and 2(b) of the "Questions Presented" were stated at page 5 and 6 as:

(2)(a) Whether, under the doctrine of lis pendens, the respondent corporation Pursue, Ltd. had standing, under an assignment of the leasehold interest in 69 Public Square, Allen County, Ohio, to prosecute the Civil Rights action entitled, Pursue, Ltd. v. Huffman, et al., 72 C 432,

Questions 1 and 2 of the "Questions Presented" read as follows: (See Brief for Appellants at pages 3 and 4)

filed by it on Dec. 1, 1972; where, on the date that Pursue, Ltd. acquired such interest from William H. Dakota, Nov. 17, 1972, a civil action entitled, Ohio ex rel Huffman v. William H. Dakota, et al., 72 C 0326 was on file in the Allen County Ohio, Common Pleas Court, seeking to abate the premises and forfeit the lease at 69 Public Square; of which filing respondent Pursue Ltd. had actual notice from the inception of its existence as a corporation, through its incorporating attorneys and also by service of process on Robert Hollis, its president, on Nov. 22, 1972; which complaint described said premises both by metes and bounds and by street address and named the owners of such real property and assignor, William H. Dakota as defendants, and over which property and persons the Allen County Common Pleas Court had acquired jurisdiction; and where on Nov. 30, 1972, the day before such federal action was filed by Pursue, Ltd., a final judgment was entered in the Allen County Common Pleas Court, forfeiting for a period of one year the leasehold interest of defendant-assignor William H. Dakota in the premises at 69 Public Square upon which interest Pursue, Ltd. was relying; and where such final judgment was known to respondent at the time such federal action was filed, having been alleged as a fact by Pursue, Ltd. in its Complaint at page 5, paragraph 18.

(2)(b) Whether the court should not have dismissed the federal action for lack of jurisdiction where such infirmity, under the Doctrine of Lis Pendens, appears on the face of the complaint.

"1. Whether the doctrine of lis pendens barred Pursue Ltd., as the assignee of the leasehold interest in 69 Public Square, Allen County, Ohio, from prosecuting the within Civil Rights Action, Pursue Ltd. v. Huffman et al, 72 Civ. 432 where (a) the complaint of Pursue Ltd. demonstrates on its face that, on the day prior to such federal filing, a final judgment had been entered against the assignor in a state court action, forfeiting such leasehold interest for a year and (b) Pursue Ltd. had actual and constructive notice of the state court litigation at the time it acquired its leasehold interest by assignment.

2. Whether, under the mandatory provisions of 28 U.S.C. section 2283, the three-judge federal district court acted in excess of its jurisdiction when it enjoined appellants from executing that portion of the Allen County Common Pleas judgment of Nov. 30, 1972, which ordered the closing of the

> theater, where the subject real estate was at that time in custodia lex in Ohio ex rel. Huffman v. Dakota, 72 Civ. 0326, an "in rem" state court public nuisance abatement action."

The responsibility of this Court to consider questions which are presented upon appeal is set forth in Rule 15(1)(c) of the Rules of the Supreme Court of the United States. That section provides, in part, as follows:

> "...The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court..."

While this Court may, in certiorari cases, limit the questions to be considered, the rule is otherwise where the question concerns the jurisdiction of the federal court below to act. Supreme Court Practice, Stern and Gressman, Fourth Edition at page 298. See 4 C.J.S. Appeal and Error, § 41 Jurisdiction of Inferior Court.

As was stated by this Court in Brown Shoe Co. v. U. S., 370 U.S. 294, 8 L.Ed.2d 510 at 524, 82 S.Ct. 1502 (June 25, 1962):

> "...a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us..."

Furthermore, it has always been the practice of this Court to consider the jurisdictional question before reaching the merits. In Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 209, 10 L.Ed.2d 297, 300, 83 S.Ct. 1185 (May 13, 1963) this Court noted:

> "...At the outset we are met with an issue which is said to be jurisdictional...as is our practice we will consider this threshold question before reaching the merits..."

Compare the recent exception stated in Secretary of the Navy v. Avrech, ___U.S. _____, 41 L.Ed.2d 1033, 1036, 94 S.Ct.___ (July 8, 1974).

IV.

In failing to rule upon the "threshold" jurisdictional question, this

Court's opinion presents an ambiguity. By remanding the cause "for further proceedings consistent with this Court's opinion", a question is raised as to the direction in which such proceedings are supposed to follow below.

Under one line of reasoning, since the question of the federal court's jurisdiction to act on Dec. 1, 1972 was clearly raised by appellants on appeal, the failure of this Court to reply to that question in its opinion, read in conjunction with the remand order and further direction that the Court should consider or reconsider the "Younger" issue, amounted to a "sub silentio" determination that the federal district court did have jurisdiction on Dec. 1, 1972, and that the "res" jurisdictional defect did not exist. Such an analysis however receives little support from this Court's treatment of the failure of the three-judge court below to address itself to the "Younger" issue in its opinion. See Slip Opinion at page 6:

> "...The judgment and opinion of the District Court give no indication that it considered whether it should have stayed its hand in

deference to the principles of federalism which find expression in Younger v. Harris." [4/]

Under a second line of reasoning, the Opinion cannot be interpreted as making a "sub silentio" determination. Jurisdictional claims which attack the very foundation of the lawsuit are "threshold" issues, which an appellate court is obliged to consider, and may not lightly be cast aside. As asserted by appellants in this petition for a rehearing, the Court's opinion has simply overlooked the critical jurisdictional issue which existed on Dec. 1, 1972. In adopting a "straw man" approach to the March 12, 1973 hearing and

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4. It seems clear that the Pursue Ltd. Complaint which was before the three-judge Court had satisfactorily pleaded the "Younger" jurisdictional allegations (see paragraph 24 of the Pursue Ltd. Complaint. Appendix at pages J-11, J-12). The temporary restraining order issued by Federal District Judge Walinski on Dec. 1, 1972, which was being considered by the three-judge Court on appellants' motion to dissolve (see page 11, supra.) read: "To prevent great and immediate irreparable harm to the plaintiff..."(Appendix at page J-19). Notwithstanding, this Court stated "As we have noted, the District Court in this case did not rule on the Younger issue..."(Slip Opinion at p.18)

the April 20, 1973 decision by the three-judge federal district court, this Court has failed to note that the jurisdictional claim was not answered, and that if the federal court did not have jurisdiction of the cause of action on Dec. 1, 1972, neither did the three-judge federal district court have jurisdiction on Mar. 12, 1973, except to determine the question of its own jurisdiction, which appellants had placed in issue on the motion to dissolve the temporary restraining order.[5/]

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5. As to the rights of a federal litigant to dissolve a temporary restraining order, Rule 65(c) of the Federal Rules of Civil Procedure provides in part as follows: "Every temporary restraining order granted without notice....shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedent of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed

(footnote continued on next page)

Under a third line of reasoning, the opinion cannot be interpreted as making a "sub silentio" determination on the "res" jurisdictional defect, nor can it be said that the Court breached its duty to rule on "threshold" jurisdictional claims which had been properly raised. The Court, in

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with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." (Our emphasis.)

Can this Court justly overlook the Statement of Facts presented herein, and the manner in which the federal district court below abused the Federal Rules re: restraining order powers? Would it not be more consistent with the procedural plan laid out in the main body of the majority opinion to retard such excessive practices by also requiring that the defendant in the state court should have exhausted his state court "restraining order" remedy before seeking "Younger" relief in the federal court. See, in this regard, the result achieved by the litigant in the Michigan State Court described at footnote 2 page 7, supra.

its order of priorities, simply did not choose to reach the "res" jurisdictional claim.[6/] The Court, instead, elevated the question of appropriateness of "Younger" interference to the position of a "jurisdictional" matter which, in the order of priorities, should first be considered by the Court.[7/] See footnote 2 to the dissent-

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6. The majority opinion simply states at page 6 of the Slip Opinion: "On this appeal, appellants raise the Younger problem, as well as a variety of constitutional and statutory issues. We need consider only the applicability of Younger."

7. Appellants submit that, while the majority opinion herein does much to solve the present problem of improper federal interference in obscenity litigation, the unwillingness on the part of this Court to assign the "res" exception a priority greater than Younger leaves a wide opening and assures the defense attorneys a means of breaching the line. Were this Court to recognize that the "res" exception applied on Dec. 1, 1972 and that appellee had a duty to press his claim of "unconstitutionality" and "great and immediate harm" in the state court (as noted at footnote 2 on page 7, supra) to its conclusion, before being able to plead the jurisdictional basis for a federal case under "Younger, that hole would be plugged. What important legal interest is being subserved, in permitting William Dakota (aka Pursue Ltd.) access to the federal courts in the middle

(footnote continued on next page)

ing opinion of Justice Brennan wherein he points out that where the federal plaintiff fails to carry the "Younger" burden of proof, the correct practice is to dismiss the complaint. Compare, however, the contradictory note of Justice Brennan at footnote 1 where he states "Yet the Court implies that Younger is not a jurisdictional matter..." (Our emphasis.)

Under Rule 15(1)(c) and the established principles of appellate review noted at page 15 and 16 herein, appellants should not be required to relitigate the "res" jurisdictional question in the federal district court below. Unless this Court resolves the above ambiguity, appellants, upon remand, will be required to again assert the "res" jurisdictional claim under the principles of law expressed above, and the matter will again be before this Court.

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of lengthy state court proceedings--proceedings which he has effectively scuttled --should not this Court require that the abandonment of the state court proceedings be clearly established before an entry into the federal court on a Younger claim can be attempted. In that case, "res judicata" could be pleaded as to the record and facts established in the state court. (see footnote 1 at page 5.)

Appellants submit that this impasse can be avoided by a slight modification to this Court's opinion as set forth hereinafter in Point V of this Petition.

V.

This Court's decision rewards a litigant whose operations are recognized by the majority opinion as being those of a wolf in sheep's clothing. See the Slip Opinion at pages 2-5 which recites as follows:

> "This case arises from (appellants) efforts to close the Cinema I Theatre, in Lima, Ohio. Under the management of both its current tenant, appellee Pursue, Ltd., and appellee's predecessor, William Dakota, the Cinema I has specialized in the display of films which may fairly be characterized as pornographic, and which in numerous instances have been adjudged obscene after adversary hearings
>
> . . .
>
> "Appellants instituted a nuisance proceeding in the Court of Common Pleas of Allen County against appellee's predecessor,

> William Dakota. During the course of the somewhat involved legal proceedings which followed, the Court of Common Pleas reviewed 16 movies which had been shown at the theatre. The court rendered a judgment...."
>
> "Appellee, Pursue, Ltd., had succeeded to William Dakota's leasehold interest in the Cinema I prior to entry of the state court judgment. Rather than appealing that judgment within the Ohio court system, it immediately filed suit in the United States District Court for the Northern District of Ohio..."

As pointed out by this Court at footnote 10:

> "...Counsel for Pursue conceded at oral argument that Pursue could have appealed the judgment of the Court of Common Pleas within the Ohio Court system."

Upon these facts, what equitable answer can be given to appellants' argument that the judgment herein should be reversed and the cause remanded to permit execution of the state court judgment, so long restrained,---and for the sole reason that

the federal filing on Dec. 1, 1972 was clearly premature?

If, thereafter, Pursue, Ltd. has a valid constitutional claim to make, it should be required to pursue the same, initially, in the state court, upon execution of the state court judgment (see footnote 2 and page 6, supra), where the application of the Ohio statute can be adjudged by the Ohio Appellate Courts in light of the record in the trial court.[8/] Failing there in their application for a stay of execution, Pursue would then be free to bring a new federal court action, as authorized by the majority opinion, at which time Pursue Ltd. would be required to plead the jurisdictional requirements set forth in the majority opinion, and at which time the federal court would have before it a complete state court record.

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8. At pages 12 and 13 of the Slip Opinion, the majority of this Court stated: "But quite apart from appellee's right to appeal had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which, as we have already explained, is quite costly in terms of the interests which Younger seeks to protect.

An addendum to this Court's opinion that, under the "res" exception and the facts of this case, the federal court filing was premature, and that the State Court had exclusive jurisdiction until the expiration of the period allowed for the perfection of an appeal, would further clarify this question of concurrent jurisdiction. Potential federal litigants such as Pursue, Ltd., who wish to pursue their constitutional claim in the federal court where the "res" is already in litigation before the state court would recognize that, procedurally, they had an election; namely, to either (1) pursue their appeal in the state court, or (2) declare the abandonment of the same, and pursue their federal court claim, in which instance, they would face the defenses discussed in this Court's opinion (including the "res judicata" defense discussed at footnote 1).

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CONCLUSION.

Petitioners pray that a rehearing be granted as to this Court's decision of March 18, 1975 and that the judgment of the District Court be reversed and the cause dismissed to permit execution of the state court judgment.

Respectfully submitted,

James J. Clancy
Attorney for Appellants.

April 9, 1975

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

James J. Clancy
Attorney for Appellants.

April 9, 1975

CERTIFICATE OF SERVICE.

I hereby certify that on this 9th day of April, 1975, copies of the within Petition for Rehearing were air-mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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APPENDIX A

Order Of Supreme Court Of The State Of Michigan, Issued March 7, 1975, Granting Defendants And Appellants Motion For Immediate Consolidation In State of Michigan ex rel, William Calahan v. Diversified Theatrical Corp., et al., CR 14-317a.

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AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 7th day of March in the year of our Lord one thousand nine hundred and seventy-five.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice,

THOMAS M. KAVANAGH,
JOHN B. SWAINSON,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
Associate Justices.

CR 14-317a
(14-317b)

STATE OF MICHIGAN, EX REL WILLIAM L. CAHALAN, Wayne County Prosecuting Attorney,

Plaintiff-Appellee,

v. 56757

DIVERSIFIED THEATRICAL CORPORATION, a Michigan corporation,

PUSSYCAT THEATRES OF MICHIGAN, INC., a Michigan corporation and JEAN SCHUMER,

PENTHOUSE THEATRES, INC., a Michigan corporation.

LIDO CINEMA CORPORATION, a Michigan corporation,

HIGHLAND THEATRE CORPORATION, a Michigan corporation and LEONARD BROOKS,

Defendants-Appellants.

On order of the Court, the motion by defendants and appellants for immediate consideration is considered, and the same hereby is GRANTED.

The motion for stay pending appeal is also considered, and the same hereby is DENIED, since it appears that a further stay is unnecessary at the present time. On May 10, 1974, the Court granted a stay of the trial court judgment perding appeal in the Court of Appeals. Although an opinion was issued by the Court of Appeals on March 4, 1975, final process, pursuant to GCR 1963, 821.3, has not. The stay order previously entered by this Court therefore remains in effect until such time as final process is issued by the clerk of the Court of Appeals. If the plaintiff shall fail to comply therewith, the Court will entertain a motion to initiate contempt proceedings against him.

T.M. Kavanagh, J., dissenting.

Swainson, J., not participating.

STATE OF MICHIGAN-ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of March in the year of our Lord one thousand nine hundred and seventy-five.

/s/
Harold Hoag, Clerk